UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendant*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

RESPONSE TO PLAINTIFFS' EXPEDITED MOTION TO PRECLUDE DEFENDANT FROM OBJECTING TO PLAINTIFFS' CERTIFICATES OF COPYRIGHT

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The core of this lawsuit is a claim that Defendant infringed individual sound recordings of Plaintiffs. Plaintiffs bring this suit, in part, on the basis of certain alleged certificates of registration. The legal effect of these registrations is in doubt because of questions of law, missing evidence, and potentially difficult fact questions. The authenticity of the certificates of registration is critically important to establish, and issues of ownership and registration are very much alive and in dispute.

Defendant's objection to Plaintiffs' certificates of copyright is not a purely technical one. Defendant raises serious questions about the factual basis for and the legal effect of the copyright applications that Plaintiffs submitted to the copyright office. *See* Part II, *infra*. Moreover, binding Eighth Circuit precedent makes it improper to circumvent the rules of evidence and procedure by taking judicial notice of the contents of a document central to the case where the document is otherwise inadmissible. *See* Part III, *infra*. Plaintiffs — who have had three years to prepare this case properly and who have been litigating cases exactly like it around the country for more than five years — hardly have the equities behind them in asking this Court to carve an exception from well-established federal rules in order to facilitate their prosecution of Jammie Thomas.

I. A NEW TRIAL IS A NEW TRIAL

Defendant is not required to present the same case she presented at her first trial. That is the point of a new trial: having engaged new counsel, having refined her strategy, having seen what Plaintiffs presented and argued and what result they obtained in the first trial, Defendant is free to change her strategy for this trial, raise objections not previously made, assert rights not previously asserted, and, in general, put on her case unshackled by what happened at the earlier trial. *See Ryan ex rel. Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir. 1984). Rule 59 authorizes a grant of new trial "on all or some of the issues"; here, new trial was granted on the entire case. *See* Docket No. 197 (order granting new trial). Because Defendant timely objected to Plaintiffs' proposed exhibits according to the scheduling order for this trial, her objection cannot be procedurally barred.

II. OWNERSHIP AND VALID REGISTRATION OF THE COPYRIGHTS AT ISSUE IN THIS CASE IS DISPUTED.

Plaintiffs write: "the only reason Defendant is now objecting to these certificates is because Defendant intends to put Plaintiffs to an unnecessary burden to establish that which has already been established and will be established again (i.e. the Plaintiffs owned and registered the copyrights at issue)." We take issue with two things in this statement: the burden of proof in a court of law is not unnecessary; and the ownership and registration of the copyrights at issue have not been established.

Even if the exhibits proffered by Plaintiff are presumed authentic, they do not establish ownership or registration of the copyrights of the sound recordings allegedly infringed in this case. On each of the form SR's in Plaintiffs' exhibits, the checkbox for work-made-for-hire is checked. Also, the title for each work is the title of an album, and the author is listed as a recording company. Plaintiffs acknowledged in their trial testimony that this is the standard procedure they follow: file a single form SR for an entire album.

What Plaintiffs have not disclosed is that the inclusion of sound recordings in the definition of works made for hire is highly controversial and most likely erroneous. See, e.g., Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. Copyright Soc'y U.S.A. 139, 164 (2005-2006); Ryan Ashley Rafoth, Note, *Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings To Be Works-for-Hire When Artists' Termination Rights Begin Vesting in Year 2013*, 53 Vand. L. Rev. 1021 (2000); *Ballas v. Tedesco*, 41 F. Supp.2d 531, 540-41 (D.N.J. 1999); *Staggers v. Real Authentic Sound*, 77 F. Supp.2d 57, 63-64 (D.D.C. 1999).

Failure to provide accurate information about the copyright claimant, the author, or the title of the work will invalidate a purported registration. *Morris v. Business Concepts Inc.*, 259 F.3d 65 (2d Cir. 2001). Where a copyright registration lists a recording company as the sole author of a work-made-for-hire sound recording, substantive issues of law and fact are raised about the validity of the registration. If a sound recording is not a work made for hire, then the recording company is not by law the author, and the registration filed with the Copyright Office listing the recording company as both the author and copyright claimant is probably not valid. *Id.* at 72. Mere statements on an application that a work is a work made for hire are not dispositive. Acceptance of these statements by the Copyright Office (which, unlike the patent office, does not do a thorough factual review of submissions) also is not dispositive. *DeSylva v. Ballentine*, 351 U.S. 570, 578 (1956).

Plaintiffs have known for many years of the uncertain legal status of their registrations. *See e.g. UMG Recordings, Inc. v. MP3.com, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000). In fact, in 1999, Plaintiffs lobbied for and received a change in the Copyright Act that explicitly added "sound recordings" to the enumerated list of works that could be works made for hire. Pub.L. 106-113, 113 Stat. 1501. While this may have solved some of Plaintiffs' problems temporarily, the law reverted back to its previous definition in 2000, and the matter has remained unsettled ever since.

Effective registration requires (a) submission by application of certain vital pieces of information, including name and address of copyright claimant, name and domicile of author(s), title of the work, etc..; (b) acceptance of that information; and (c) submission and acceptance of one or more original copies of the work to the Copyright Office. 18 U.S.C. 409. The evidentiary problems in the case extend beyond the effects of the uncertain legal status of sound recordings. Plaintiffs have not submitted to the Court any authenticated copies of the original works they claim registration for. Nor have Plaintiffs submitted any proof of written agreements to prove their status as authors, owners, or licensees of the sound recordings at issue.

Plaintiffs also continually dodge the issue of whether, for any particular sound recording, they are the owners or exclusive licensees of the copyrights. Such distinctions are important. The registrant of a collective work does not also register the underlying contributed works unless at time of registration the registrant was the actual owner, and not the exclusive licensee of the underlying works. *See Morris, supra*.

Ultimately, all of the issues that arise from or are related to the certificates of registration are determinants of standing to sue and the right to demand statutory damages. Copyright law provides that, with certain exceptions not relevant here, "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 18 U.S.C. 411(a). Further, statutory damages are generally not available for infringements that occurred prior to registration. 18 U.S.C. 412.

III. JUDICIAL NOTICE OF PLAINTIFFS' ALLEGED COPIES OF CERTIFICATES OF REGISTRATION IS IMPROPER.

Defendant will, and has the right to, object to the admission of unauthenticated records into evidence by Plaintiffs. The federal rules of evidence and civil procedure, and controlling Eighth Circuit law, support Defendant's right to this objection and will sustain it on the merits.

A variety of rules govern the admissibility of evidence for trial purposes. Generally, a record may not be admitted except in compliance with these rules. *Mullican v. United States*, 252 F.2d 398, 402 (5th Cir. 1958) ("[W]e do not think that copies of official records can be properly admitted without a substantial compliance with the statute and the rules."). Rule 44(a)(1) of the Federal Rules of Civil Procedure provides the general method for proving an official record. F.R.C.P. 44(a)(1). It requires a "copy attested by the officer with legal custody of the record...and accompanied by a certificate that the officer has custody."

If a plaintiff cannot meet the requirements of Rule 44(a)(1), other rules of evidence have expanded the methods available to prove an official record. *See AMFAC Distribution Corp. v. Harrelson*, 842 F.2d 304 (11th Cir. 1988); *United States v. Pent-R-Books, Inc.*, 538 F.2d 519 (2d Cir. 1976). In particular, Rule 902 of the Federal Rules of Evidence provides a method of self-authentication for copies of public records. Similar to F.R.C.P. 44(a)(1), Rule 902 requires a certificate from "the custodian or other person authorized to make the certification." F.R.E. 902(4).

However, because they do not have adequate time to comply with the foregoing rules, Plaintiffs propose a new method for admission of records at trial — a trial, it should be noted, the date of which Plaintiffs vigorously demanded remain unchanged even when Defendant had to substitute new counsel less than four weeks from its start. Plaintiff now suggests that in lieu of authenticated records, the Court may simply take judicial notice of unauthenticated papers, lacking any ascertainable chain of title, provided by Plaintiff. Such an act by this Court would be improper and outside the scope of its discretion.

F.R.E. 201 (also known as "judicial notice") provides a mechanism to establish the existence of facts that are not subject to reasonable dispute without having to provide formal evidence. However, there are substantive differences between the operation of Rule 201 and the other rules of evidence and procedure used to prove records. Rule 201 is not a mechanism to admit records into the trial itself. Under 201(g), juries receive the facts from the Court directly. Juries are instructed by the judge to "accept as conclusive any fact judicially noticed." Thus, a fact brought in by judicial notice isn't subject to the adversarial protections of rebuttal evidence, cross-examination, and arguments to attack contrary evidence. *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66 (2d Cir. 1998)

This limitation means that courts do not allow judicial notice of facts that are subject to reasonable dispute. *Id.* at 70 ("Because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b)."); *California ex rel. RoNo, LLC v. Altus Finance S.A.*, 344 F.3d 920, 931 (9th Cir.2003).

In addition to avoiding controversial matters, judicial notice must also comport with, and not subvert, the federal rules of evidence and civil procedure. The Eight Circuit recently clarified the doctrine of judicial notice in *American Prairie Const. Co. v. Hoich*, — F.3d — (8th Cir. March 24, 2009) (Nos. 08-1288, 08-1292, 08-1394). The Eighth Circuit reversed the district court where judicial notice was given “in contravention of the relevancy, foundation, and hearsay rules.” *Id.*

The rules of evidence and procedure clearly provide the methods of admission for records like certificates of registration. These methods are especially important to demonstrate authenticity where, in a case like this, the records are central to the dispute, and contain controversial facts. Defendant believes that, as a matter of law, sound recordings cannot be works made for hire. And, in the alternative, Defendant will vigorously preserve her right to cross-examine and rebut the facts alleged on any certificates of registration that Plaintiffs enter into evidence. For these reasons, the certificates of registration are not proper subject matters for judicial notice.

Defendant is also substantively prejudiced if judicial notice is given to Plaintiffs’ unauthenticated exhibits. The Copyright Act gives special weight to the information in a certificate of registration. In particular, "[i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." It would be improper for a Court to give judicial notice to an unauthenticated document, when such notice would by operation of law constitute *prima facie* evidence of the information put forth by the party proffering the document.

An examination of Plaintiff's exhibits also raises genuine questions about the authenticity of the proffered copies. We note that some copies show a seal from the Registrar of the Copyright Office, and some do not. Some copies indicate, by what appear to be people's initials, that they have been examined and checked by Copyright Office employees, while others indicate they have been examined but not checked. Some indicate that funds were received with the application, others have no such indication. These irregularities all indicate the need for authenticated copies from the Copyright Office.

Finally, Plaintiff's suggestion that an objection raised at or before trial to evidentiary foundation will result in an actionable claim under 18 U.S.C. § 1927 is ridiculous and offensive. We respectfully ask that this Court address this explicitly at the conference-call hearing it has convened. Defendant has a right to hear from the Court that she may vigorously, and without fear of repercussion, pursue her defense.

IV. CONCLUSION

We state again, as we did originally in our Motion to Suppress: if ever there were a civil proceeding that demanded due recognition of the procedural safeguards of the federal rules of evidence and civil procedure, it would be a case like this, where a defendant faces civil damages far in excess of the economic injury to the plaintiffs.

These putatively civil damages serve an almost entirely punitive purpose. Plaintiffs, in their prosecution of these cases, have the resources of an entire industry at their disposal. They command, quite literally, armies of lawyers, investigators, and other agents to seek out and prosecute citizens without the time or money to adequately defend themselves. It is proper for this Court to ensure that the evidence brought forth, especially evidence that lies within the control of the Plaintiffs, meets the standards of admissibility that have evolved over many decades of American legal experience.

Defendant in this response asks this Court not to heighten its safeguards — though we think it should. Defendant asks this Court only to enforce the law that exists, to ensure the dignity of fair process, and that the burdens placed properly on Plaintiffs, and the protections granted Defendant, be upheld. Respectfully, Defendant asks this Court to deny Plaintiffs' motion in full.

Respectfully submitted,

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